

Claimant did suffer an accidental injury. Claimant's accidental injury did arise out of and in the course of employment. The accidental injury was the prevailing factor causing the need for treatment. Although the medical records do not support claimant's testimony, the Court finds the claimant to be a credible witness. The Court believed the claimant when he testified he was hesitant to report his accidental injury because his department was short handed. The employer's witness confirmed claimant was sent to cover a fatality accident on 6/23/12 in which

a driver flipped an all terrain vehicle backwards on a slick embankment. The Court finds it more likely than not claimant's injury occurred as he testified.¹

Respondent contends the ALJ erred in finding claimant sustained personal injury by accident arising out of and in the course of his employment. Respondent also maintains Judge Avery erred in finding claimant's alleged accidental injury was the prevailing factor in causing claimant's medical condition, need for treatment, and disability.

Claimant argues the ALJ's Order should be affirmed.

The issues presented for Board review are:

(1) Whether claimant sustained personal injury by accident arising out of and in the course of his employment with respondent.

(2) Whether claimant's accidental injury was the prevailing factor in causing claimant's medical condition, need for treatment, and disability.

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant was age 38 when he testified at his September 5, 2012, deposition. He began employment for respondent as a deputy sheriff approximately 8 years ago. On June 23, 2012, claimant was dispatched to the scene of an accident in which a driver was pinned underneath a four wheeler that had rolled on top of him.

Claimant described the June 23, 2012, accident:

I was working a fatality accident up on 60th Street where a guy had a four-wheeler roll over on him and pinned him down in some water, and I got there and was going down the embankment and slipped and twisted²

The embankment claimant descended was steep, rocky and muddy. After he slipped he fell backwards, he twisted and landed on his back side. Claimant felt a sharp pain and burning in his lower back. Claimant testified a reserve deputy, Jeremy Karleskint, witnessed claimant's fall, but has not testified. Following June 23, 2012, claimant's condition worsened as he continued to perform his regular duties. During that period

¹ ALJ Order at 1.

² Feagins Depo. at 37.

claimant experienced pain getting into and out of his patrol car. He last worked for respondent on July 3, 2012.

Claimant initially sought treatment on his own from his personal physician, Dr. Robert Nichols. Claimant's office visit with Dr. Nichols was on July 6, 2012, when he provided Dr. Nichols the following history:

HPI: Mr. Feagins complains of the following (by systems):

Arthritis symptoms: long standing low back pain but now with increase pain R SI area and mild weakness R leg but radicular pain to L foot after working in garden picking black berries today. Call in to work because realizes would be dangerous for him to try to do his job like this.³

Dr. Nichols prescribed medication and recommended a lumbar MRI scan.

Claimant admitted he experienced an increase in his low back pain when assisting his wife picking black berries on July 6, 2012, and that the increased pain prompted him to see Dr. Nichols the same day. However, claimant testified his role in assisting his wife picking berries was standing and holding a plastic bowl.

An MRI conducted on July 9, 2012, revealed a large ruptured disc at L5-S1 on the right with a possible extruded fragment. Dr. Nichols recommended an orthopedic consultation.

On August 7, 2012, Dr. Nichols issued what he referred to as an "addendum/clarification of details of previous note." The report was requested by claimant and states:

Although back pain was acutely worse on day seen and acute exacerbation while holding pan while wife picked berries the initial event and onset of pain occurred while he was working an accident scene a few weeks prior to visit identifying increased pain. It occurred while making his way down an embankment. Had recognized pain then, tried to allow it to be better without care but it lingered and gradually progressed related to that episode until the acute increase as documented in previous notes.⁴

Claimant's attorney scheduled claimant to see an orthopedic surgeon, Dr. Randall Hendricks, in Tulsa, Oklahoma. Dr. Hendricks performed an examination on August 8, 2012. Claimant's history regarding his accidental injury on June 23, 2012, was consistent with claimant's testimony and the addendum/supplemental record of his visit with Dr.

³ P.H. Trans., Resp. Ex. A at 1.

⁴ *Id.*, Cl. Ex. 6.

Nichols on July 6, 2012. However, there were inaccuracies contained in Dr. Hendricks' history:

(1) Although Dr. Nichols correctly noted claimant had a history of low back pain and was seen by Dr. Nichols for back pain on May 20, 2012, Dr. Hendricks indicated claimant did not have radicular pain at the May 20th office visit. The medical records from that appointment actually reflect claimant was experiencing low back pain and pain radiating into the left hip and left leg.

(2) Although the records of Dr. Nichols and claimant's testimony indicate his pain increased while helping his spouse pick black berries on July 6, 2012, Dr. Hendricks suggested the berry picking episode may instead have occurred before claimant's May 20, 2012, appointment with Dr. Nichols.⁵

Dr. Hendricks opined the "major cause [of claimant's herniated disc] is the work-related injury of June 23, 2012, while employed with Bourbon County Sheriff's Department as a deputy."⁶

On August 13, 2012, Dr. Hendricks authored a report in which he recommended surgical treatment and stated "it is my opinion that the patient's injury occurred as a result of his work-related activities while employed with Bourbon County Sheriff's Department as a deputy."⁷

On September 6, 2012, Dr. Hendricks performed surgery consisting of an L5-S1 discectomy and fusion with instrumentation.

Claimant admitted he had a prior history of back pain. Before 2012, claimant's back pain prompted him to seek chiropractic treatment. The medical records document two doctor's visits before the June 23, 2012, event:

(A) Claimant was seen by Dr. Pankaj Gugnani⁸ on April 20, 2012, for a number of conditions including hypertension and gastroesophageal reflux disease. Claimant's complaints included back pain, however, the doctor's evaluation was negative for back pain and no treatment was provided for claimant's back.

⁵ The history provided to Dr. Hendricks does corroborate claimant's description of his role in the berry picking to holding a pan.

⁶ P.H. Trans., Cl. Ex. 1 at 2.

⁷ *Id.*, Cl. Ex. 2.

⁸ Apparently, Drs. Nichols and Gugnani are associated with Mercy Clinic Primary Care in Fort Scott, Kansas.

(B) As noted above, claimant saw Dr. Nichols on May 20, 2012, with a history of:

Arthritis symptoms: recent acute recurrence of chronic back pain. no specific injury but does police work and gardening. low back but sl radiation to L hip and leg.⁹

Claimant testified he had no back pain by the time his June 23, 2012, accidental injury occurred. Claimant's back pain was more severe following the June 23, 2012, accident than he had experienced before. He had not felt pain, numbness and tingling in his right leg before the accident. There is no evidence claimant was diagnosed with a herniated lumbar disc or with right radiculopathy before the June 23, 2012, event.

Claimant did not report his accident to respondent until July 9, 2012. He provided two explanations for his failure to report the accident to respondent before July 9: (1) claimant thought he just pulled a muscle that would get better on its own, and (2) he thought reporting his injury as work-related might have the effect of disrupting an already shorthanded sheriff's department.

Bill Martin, respondent's undersheriff and claimant's supervisor, confirmed that claimant did not report his accidental injury to respondent before July 9, 2012. Mr. Martin further testified he observed claimant working between June 23, 2012, and July 3, 2012, but saw no indication claimant was suffering any back problems.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b provides in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time

⁹ *Id.*, Resp. Ex. A at 3.

and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

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(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

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(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

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(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

The undersigned Board member agrees with the ALJ that claimant sustained personal injury by accident arising out of and in the course of his employment with respondent on June 23, 2012.

Claimant's testimony regarding how, when, and where his accidental injury occurred is uncontradicted. Claimant's testimony that his accident was witnessed by a co-employee is also unrefuted. The medical evidence of Drs. Nichols and Strickland corroborates claimant's testimony regarding his accident. Respondent presented no evidence that claimant's large ruptured disc at L5-S1 was caused by any other traumatic event or resulted from a continuation of a preexisting condition.

The evidence establishes claimant's prior back and left leg symptoms were minor and transient compared to the symptoms claimant suffered following the June 23, 2012, accident. Before the accident claimant was capable of carrying out his regular duties for respondent. There is no evidence supporting the notion claimant experienced right radiculopathy before the accident. Also lacking is any evidence claimant previously needed a lumbar discectomy and fusion.

There is no evidence that claimant's activities on July 6, 2012, played any role in causing claimant's injury. On the contrary, claimant was merely standing and holding a plastic container, which seems unlikely to have caused claimant's large disc herniation.

Respondent underscores claimant's failure to report his injury by accident until July 9, 2012. However, claimant provided respondent notice well within the period allowed by K.S.A. 2011 Supp. 44-520(a)(1)(A). Respondent stipulated to timely notice.¹⁰

The undersigned Board member is also persuaded claimant sustained his burden to prove that claimant's accident on June 23, 2012, was the prevailing factor causing claimant's injury, medical condition and resulting disability. The medical reports of Drs. Nichols and Strickland point to claimant's slip and fall as the cause of his injury and there is no contrary medical opinion in this record.

The undersigned Board member notes the ALJ observed the testimony of claimant and Bill Martin. Judge Avery specifically found claimant to be a credible witness. Although

¹⁰ *Id.* at 3.

the Board's review is de novo regarding issues which fall within its jurisdiction,¹¹ including issues of credibility, it can be advantageous for the ALJ to actually see and listen to witnesses. The Board may provide an ALJ's determination of credibility some deference where, as here, the ALJ observed the in-person testimony of witnesses.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹³

CONCLUSION

(1) Claimant sustained personal injury by accident arising out of and in the course of his employment with respondent on June 23, 2012.

(2) Claimant's accident was the primary factor causing his injury, medical condition and resulting disability.

WHEREFORE, the undersigned Board Member finds that the October 4, 2012, preliminary hearing Order entered by ALJ Brad E. Avery should be and hereby is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2013.

HONORABLE GARY R. TERRILL
BOARD MEMBER

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¹¹ K.S.A 44-555c(a).

¹² K.S.A. 44-534a.

¹³ K.S.A. 2011 Supp. 44-555c(k).